

**ZECON CAPITAL VENTURES SDN BHD v. AFFIN HWANG
INVESTMENT BANK BHD**

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HADHARIAH SYED ISMAIL JCA
SUPANG LIAN JCA

[CIVIL APPEAL NO: Q-02(A)-1787-09-2019]
17 SEPTEMBER 2021

LAND LAW: Charge – Order for sale – Validity – Challenge against – Whether charge produced by means of misrepresentation, undue influence and total failure of consideration – Whether inducement proved – Banker and customer relationship – Whether there was equal bargaining power – Whether respondent acted unconscionably – Whether transaction fair and just – Whether charge had grave effect – Whether just in circumstances to grant order for sale

LAND LAW: Charge – Order for sale – Distinction between application under s. 256 of National Land Code and s. 148 of Land Code (Sarawak) (Cap 81) – Whether s. 256 with ‘cause to the contrary’ test applicable in Sarawak – Whether courts in Sarawak ought to apply test ‘as in the circumstances seems just’ in s. 148

By a letter of award, Jabatan Kerja Raya Malaysia (‘JKR’) awarded to Zecon Berhad (‘borrower’) the contract for the construction and completion of a hospital in Sarawak (‘project’) for the contract sum of RM495 million. By a letter of offer, supplemental letters of offer and the facilities agreement, the respondent and two other banks granted the bank guarantee (‘BG’), revolving credit (‘RC’) and letter of credit (‘LC/TR’) facilities in the total sum of RM165 million (‘existing syndicated facilities’) to the borrower for the purpose of part financing the construction and completion of the said project. It was agreed between the respondent and the two banks (‘syndicated lenders’) and the borrower that the existing syndicated facilities would be secured by, *inter alia*, a charge over the borrower’s BG sinking fund account at the respondent and an assignment of contract proceeds of the said project by the borrower. After the execution and perfection of the facilities and securities documents, the respondent issued the BG in respect of the said project, released the RC facility to the borrower and allowed partial drawdown of the LC/TR facility. Subsequently, the appellant charged the said land to the respondent. The appellant contended the charge was intended as a security for the additional facility of RM30 million the borrower had applied from the respondent and which the respondent did not grant. The respondent alleged the charge was additional security for the existing syndicated facilities of RM165 million. The borrower defaulted its repayment to the respondent. The respondent then demanded all monies due and owing under the syndicated facilities. The respondent gave 30 days’ notice to the appellant demanding payment of the outstanding sum of

- A RM104,362,841.77 but there was no payment made by the appellant. The respondent then filed originating summons at the Kuching High Court for an order for sale of the appellant's charged land under s. 148(2)(c) of the Land Code (Sarawak) (Cap 81) ('SLC') and O. 83 of the Rules of Court 2012. The appellant opposed the respondent's originating summons on the ground that
- B the charge was executed under misrepresentation, undue influence and a total failure of consideration. The Judicial Commissioner ('JC') allowed the respondent's originating summons and granted the order for sale. Hence, the appellant appealed. The appellant raised two legal points. First, that the JC erred in his interpretation and application of s. 148 of the SLC. His Lordship
- C also misdirected himself by adopting and applying the provision 'cause to the contrary' of s. 256 of the National Land Code ('NLC') instead of the provision of 'in the circumstances seems just' of s. 148 and erred in holding that there was no merit in the arguments of the appellant and thereby granting an order for sale of the said land. The JC ought to have appreciated that
- D s. 148 confers the court with a wider discretion to consider the justice of the case than s. 256 and accordingly, ought to have applied the wide discretionary jurisdiction and found, with all the materials adduced by the appellant before the court, that it was not 'in the circumstances seems just' to grant an order for sale. Secondly, that the JC erred in holding that the appellant's claims of fraud, misrepresentation, undue influence and total
- E failure of consideration for the charge were premised solely on hearsay evidence when the said claims were substantiated by contemporary documentary evidence.

Held (allowing appeal; setting aside order of High Court)

Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

- F (1) The wordings of s. 256 of the NLC and s. 148 of the SLC are different and the wordings of the former and the latter are clear. Section 256 of the NLC is applicable to courts in West Malaysia only whilst s. 148 of the SLC is applicable to courts in Sarawak. The phrase 'cause to the
- G contrary' apply to s. 256 of the NLC and the words 'as in the circumstances seems just' applies to s. 148 of the SLC. The interpretation of s. 148 of the SLC has been established by the apex court in *Kuching Plaza Sdn Bhd v. Bank Bumiputra (M) Bhd, Citibank N.A v. Jong Tze Khiok & Anor*. The courts in Sarawak must first acknowledge these differences and accept the fact that s. 256 of the NLC with the
- H 'cause to the contrary' test is not applicable in Sarawak. Therefore, the courts in Sarawak have no option, but to apply the 'as in the circumstances seems just' test in s. 148 of the SLC, which the JC failed to apply here. The JC had erred in law and misdirected himself by adopting and applying the test under s. 256 of the NLC which is not
- I applicable in Sarawak. This was a material error of law which tantamount to a misdirection in law. On this ground alone, the JC's decision was plainly wrong and ought to be set aside. (paras 22 & 25)

- (2) The respondent denied the appellant's contention of fraud, misrepresentation and total failure of consideration and averred that paras. 9 and 10 of the affidavit in opposition of one Haji Zainun, the appellant's director, was hearsay evidence on the basis of the preceding words 'I was informed.' However, these words showed that the deponent had received direct information or feedback from his colleague about the meeting and discussion between the appellant's agents and the respondent's officers that had taken place at the respondent's place and such occurrence was proven to be true. The JC had taken a simplistic approach on this issue without even considering its importance to the appellant's case that the charge was created as security for the additional facility of RM30 million requested. The evidence in paras. 9 and 10 formed the foundation of the appellant's case. (paras 27 & 30)
- (3) The appellant was challenging the validity of the charge on the ground it was procured by means of misrepresentation, undue influence and total failure of consideration. The appellant claimed the charge was not valid. This was a claim *in rem*. The appellant contended the misrepresentation was in written form. The first misrepresentation was that the charge document did not mention the additional facility of RM30 million they had requested. The second misrepresentation was despite stating they would evaluate the appellant's application *via* their letter of 20 December 2016, the respondent did not evaluate or process the appellant's application for the additional facility of RM30 million even after the charge documents had been perfected in favour of the respondent. In addition, the additional facility of RM30 million was not granted to the appellant. Thus, there was total failure of consideration. The respondent admitted they never agreed to grant the additional facility of RM30 million. Therefore, when the respondent informed the appellant they would evaluate the appellant's application only after the appellant had perfected the charge, the respondent knew that the statement (will evaluate) was false. Therefore, misrepresentation was established. The respondent also knew if they (respondent) informed the appellant outright that their application was rejected, the charge could not be created. In order to get the charge registered, the respondent induced the appellant to sign the charge documents first. Therefore, inducement was proven. So, the charge was for the benefit of the respondent only. (para 31)
- (4) The charge had grave effect on the appellant. The appellant lost its opportunity to use the said land as security to get financial facility from other financial institutions. The relationship between the respondent and the appellant was that of a banker and customer. As between them, there was no equal bargaining power. The appellant was a weaker party. The charge came about because it was the appellant who approached the respondent, hopeful to get the additional facility of RM30 million armed

- A with property worth more than RM100 million to offer as security because they were in dire need of money to complete the project. By their conduct of concealing their true intention of not granting the RM30 million but wanting the charge, the respondent had acted unconscionably towards the appellant. The transaction was unfair and unjust to the
- B appellant. A charge obtained by means of misrepresentation, undue influence and total failure of consideration was not a valid charge. It did not seem just in the circumstances to grant an order for sale. (paras 32 & 34)

Case(s) referred to:

- C *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793 CA (*refd*)
Citibank N.A v. Jong Tze Khiok & Anor [1993] 4 CLJ 325 SC (*refd*)
HSBC Bank Malaysia Bhd v. Tan Sri Datuk Amar Ling Beng Siew [2003] 4 CLJ 763 HC (*refd*)
Kuching Plaza Sdn Bhd v. Bank Bumiputra (M) Bhd [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223 SC (*refd*)
- D *Llyods Bank Ltd v. Bundy* [1975] 1 QB 328 (*refd*)
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC (*refd*)
Reardon Smith Line v. Hansen Tangen [1976] 1 WLR 989 (*refd*)
RHB Bank Bhd v. Alom Industries Sdn Bhd [2007] 5 CLJ 138 HC (*refd*)

Legislation referred to:

- E Land Code (Sarawak) (Cap 81), s. 148(2)(c)
National Land Code, ss. 256(3), 340
Rules of Court 2012, O. 83
For the appellant - Kilat Beriak & Daisy Tham Yek Ngo; M/s Beriak Tham Assocs
For the respondent - Chan Yin Xi & Adrian Chew; M/s Battenberg & Talma
- F [Editor's note: *For the High Court judgment, please see Affin Hwang Investment Bank Bhd v. Zecon Capital Ventures Sdn Bhd* [2020] 1 LNS 597 (*overruled*).]
Reported by Suhainah Wahiduddin

JUDGMENT

- G **Hadhariah Syed Ismail JCA:**

Introduction

- [1] This is an appeal by the appellant against the decision of the High Court, given at Kuching on 11 September 2019, granting the respondent's application for an order for sale of the appellant's land described as Lot No. 14, Block 16, Salak Land District (the said land).
- H [2] The appellant raised two legal points. First, the learned Judicial Commissioner erred in his interpretation and application of s. 148 of the Sarawak Land Code. His Lordship also misdirected himself by adopting and applying the provision "cause to the contrary" of s. 256 of the National Land Code instead of the provision of "in the circumstances seems just" of s. 148 and erred in holding that there was no merit in the arguments of the appellant
- I

and thereby granting an order for sale of the said land. The learned Judicial Commissioner ought to have appreciated that s. 148 confers the court with a wider discretion to consider the justice of the case than s. 256 and accordingly ought to have applied the wide discretionary jurisdiction and found, with all the materials adduced by the appellant before the court, that it is not “in the circumstances seems just” to grant an order for sale.

A

B

[3] Second, the learned Judicial Commissioner erred in holding that the appellant’s claims of fraud, misrepresentation, undue influence and total failure of consideration for the charge are premised solely on hearsay evidence when the said claims are substantiated by contemporary documentary evidence, namely, letter dated 15 December 2016, letter dated 20 December 2016 and the valuation report.

C

Background Facts

[4] By a letter of award dated 26 April 2013, Jabatan Kerja Raya Malaysia (JKR) awarded to Zecon Berhad (borrower) the contract for the construction and completion of Hospital Petra Jaya, Kuching, Sarawak (the project) for the contract sum of RM495 million.

D

[5] By a letter of offer dated 27 September 2013, supplemental letters of offer dated 9 December 2013 and 10 December 2013 and the facilities agreement dated 27 December 2013, the respondent and two other banks (Bank Pembangunan Malaysia Berhad and Affin Bank Berhad) granted the bank guarantee (BG), revolving credit (RC) and letter of credit (LC/TR) facilities in the total sum of RM165 million (the existing syndicated facilities) to the borrower for the purpose of part financing the construction and completion of the said project.

E

F

[6] It was agreed between the respondent and the two aforesaid banks (the syndicated lenders) and the borrower that the existing syndicated facilities would be secured by:

- (i) a charge over the borrower’s BG sinking fund account at the respondent;
- (ii) an assignment of contract proceeds of the said project by the borrower;
- (iii) an accounts charge by the borrower over its bank accounts at the respondent;
- (iv) an assignment of insurance by the borrower;
- (v) deeds of subordination by Dawla Capital Sdn Bhd and Econ Engineering Sdn Bhd;
- (vi) a personal guarantee by one Datuk Hj Zainal Abidin bin Hj Ahmad to the respondent;

G

H

I

- A (vii) a corporate guarantee by one Dawla Capital Sdn Bhd to the respondent; and
- (viii) an assignment of guarantee by one Zecon Engineering Sdn Bhd.

B [7] From para 4 above, it can be seen that the appellant was not a security party for the existing syndicated facilities and the appellant's said land was not a security for the existing syndicated facilities.

C [8] After the execution and perfection of the aforesaid facilities and securities documents, from 2013 until 2016, the respondent issued the BG in respect of the said project, released the RC facility to the borrower and allowed partial drawdown of the LC/TR facility.

D [9] On 9 January 2017, the appellant charged the said land to the respondent. The execution and purpose of this charge was a contentious issue before the High Court. The appellant contended the charge was intended as a security for additional facility of RM30 million the borrower had applied from the respondent and which the respondent did not grant. On the other hand, the respondent alleged the charge was additional security for the existing syndicated facilities of RM165 million.

E [10] The borrower defaulted its repayment to the respondent. By a letter dated 7 September 2018 from the respondent to the borrower, the respondent demanded all monies due and owing under the syndicated facilities.

F [11] By a letter dated 26 September 2018 from the respondent's solicitors, Messrs Battenberg & Talma, to the appellant, the respondent through its solicitors gave 30 days' notice to the appellant demanding payment of the outstanding sum of RM104,362,841.77 as at 7 September 2018 together with interest. There was no payment made by the appellant.

G [12] On 13 November 2018, the respondent filed Originating Summons No. KCH-24L-114-11-2018 at the Kuching High Court for an order for sale of the appellant's charged land under s. 148(2)(c) of the Sarawak Land Code and O. 83 of the Rules of Court 2012.

[13] The appellant opposed the respondent's originating summons on the ground the charge was executed under misrepresentation, undue influence and total failure of consideration.

H [14] After considering the affidavit evidence, on 11 September 2019, the learned Judicial Commissioner (JC) allowed the respondent's originating summons and granted the order for sale.

The High Court Decision

I [15] In arriving at his decision, the learned JC made the following findings of facts:

- (a) The certificate of indebtedness dated 25 July 2019 shows that the borrower had utilised and enjoyed the facilities;

- (b) The facilities were recalled resulting from the borrower's default of the terms of the syndicated loan documentation; A
- (c) The charged land was charged to the limit of RM165 million which was consistent with the terms of the facilities and was supported by the borrower's board of director's resolution in accepting the RM165 million facilities which made no mention of RM30 million facility; B
- (d) The appellant's allegation of fraud and misrepresentation was premised on hearsay evidence;
- (e) The application to sell charged land is an action *in rem* and the appellant can ventilate its grouses with an action *in personam*; and C
- (f) There is no "cause to the contrary" to delay the order for sale.

The First Point

[16] Learned counsel for the appellant argued that from his grounds of judgment, the learned JC had clearly erred in law and misdirected himself by adopting and applying the provisions of s. 256 of the National Land Code (NLC) which are not applicable in Sarawak. He submitted that the correct law to be applied in Sarawak is s. 148 of the Sarawak Land Code (SLC) which provides as follows: D

148(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied. E

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court: F

(a) for an Order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or G

(c) for sale of the charged land, and the Court after hearing the evidence may make such order as in the circumstances seems just.

[17] It is common ground that the power to grant the order for sale under s. 148 of the SLC is discretionary as the court has to be satisfied that it seems just in the circumstances to make the order; see *Kuching Plaza Sdn Bhd v. Bank Bumiputra (M) Bhd* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223; [1991] 3 MLJ 163; *Citibank N.A v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325; *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793 and *RHB Bank Bhd v. Alom Industries Sdn Bhd* [2007] 5 CLJ 138. H

[18] Section 256(3) of the NLC provides that an order for sale "shall" be made unless the court is satisfied of the existence of "cause to the contrary". This section is mandatory in the sense that the court must make such order I

- A if there is no cause to the contrary shown by the chargor. The cause to the contrary may be established only in three categories of cases: (i) when a chargor is able to bring his case within the exceptions to the indefeasibility doctrine in s. 340 of the National Land Code; (ii) when the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) if the granting of the order for sale is against some rule of law or equity; see *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77.

- C [19] In *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, the Court of Appeal acknowledged that an order for sale under the National Land Code is different from that under the Sarawak Land Code and cautioned against application of cases decided under the National Land Code by the courts in Sarawak. At pp. 800 & 801 of the judgment, Gopal Sri Ram JCA said:

- D Now, although s. 148(3) of the Sarawak Land Code is similar in effect to s. 254(1) of the National Land Code (see, *Citibank v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739), ss. 148(1) and (2) of the former are differently constructed from s.256 of the latter. Under s. 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders: the only consideration being that of justice in the circumstances of the case ...

- E Contrast this with s. 256 of the National Land Code ..., the court “shall” make an order for sale unless there is shown “cause to the contrary”. ...

- F The only reason we make these points is to draw attention to the danger of courts in Sarawak applying decisions under s. 256 of the National Land Code, such as *Low Lee Lian* without addressing the differences between the two provisions. They must keep in the forefront of their minds that the section they are dealing with is very different from that applied by the courts in the State of Malaya.

- G [20] Learned counsel for the appellant submitted that the clear wordings of s. 148 of the SLC call for more liberal construction than s. 256 of the NLC. He, therefore, submitted that His Lordship’s decision which is premised on the wording of s. 256 of the NLC is fundamentally wrong in law.

- H [21] Learned counsel for the respondent submitted there was no misdirection in law. The question whether the powers granted under s. 148 of the SLC confer a wider discretion than that of s. 256 of the NLC is irrelevant. Once the court has determined that the allegation of fraud and misrepresentation were hearsay and not admissible, there was no evidence before the court for the learned JC not to exercise his discretion to grant an order for sale. Thus, it was submitted that there was nothing “plainly wrong” or inconsistent at all with His Lordship’s finding that there was no cause to the contrary. It is further submitted that the approach taken by the learned JC in this matter is not erroneous and His Lordship had properly directed

himself on the law and applied it correctly. The respondent relied on the case of *HSBC Bank Malaysia Bhd v. Tan Sri Datuk Amar Ling Beng Siew* [2003] 4 CLJ 763 as an authority which accorded the phrase “as in the circumstances seems just” in the SLC the same interpretation as given to the phrase “cause to the contrary” in *Low Lee Lian*.

[22] We disagree with the respondent’s submission. Our reasons are these. It is a fact that (a) the wordings of s. 256 of the NLC and s. 148 of the SLC are different; (b) the wordings of the former and the latter are clear; (c) s. 256 of the NLC is applicable to courts in West Malaysia only whilst s. 148 of the SLC is applicable to courts in Sarawak; (d) the phrase “cause to the contrary” apply to s. 256 of the NLC and the words “as in the circumstances seems just” applies to s. 148 of the SLC; (e) the interpretation of s. 148 of the SLC has been established by the apex court in *Kuching Plaza Sdn Bhd v. Bank Bumiputra (M) Bhd* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223 SC; *Citibank N.A v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325. To avoid any confusion, in our view, the courts in Sarawak must first acknowledge these differences and accept the fact that s. 256 of the NLC with the “cause to the contrary” test is not applicable in Sarawak. Therefore, the courts in Sarawak have no option, but to apply the “as in the circumstances seems just” test in s. 148 of the SLC.

[23] With regard to the case of *HSBC Bank Malaysia Bhd v. Tan Sri Datuk Amar Ling Beng Siew* [2003] 4 CLJ 763, we find the learned High Court Judge in that case was merely giving his opinion that the phrase “as in the circumstances seems just” should be given a narrow and restrictive interpretation for commercial purposes. Despite his narrow interpretation approach, in the end, the learned High Court Judge applied the correct test of “as in the circumstances seems just”. At p. 772 of the report, the learned High Court Judge said:

Lastly, on the materials before me, has the defendant shown that it would not be “just in the circumstances” to order a sale of the defendant’s shares in the said lands.

[24] Therefore, it is incorrect for the respondent to say *HSBC Bank Malaysia Bhd v. Tan Sri Datuk Amar Ling Beng Siew* is an authority for the proposition that the Sarawak Court have applied the “cause to the contrary” test. In our view, to interpret the phrase “as in the circumstances seems just” as having the same meaning with the phrase “cause to the contrary” is to put words into s. 148(2)(c) of the SLC. This approach is wrong. The words of s. 148(2)(c) are clear. The role of the court is to give effect to those words. There is no need for the Sarawak Court to refer to *Low Lee Lian*’s case when interpreting s. 148(2)(c) of the SLC. This is because *Low Lee Lian* deal with s. 256(3) of the NLC. In *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, a case on s. 148 SLC, the Court of Appeal ruled that *Low Lee Lian* is not binding on the Sarawak Courts. The Court of

- A Appeal decision in *Century Land Resources* puts paid to the argument put forth by the respondent. Instead, they should refer to decided cases by the apex court on s. 148(2)(c) which is binding on the Sarawak Courts.

- [25] In the present case, we find the learned JC had failed to apply the test of “as in the circumstances seems just”. Instead, he relied on *Low Lee Lian*’s case and applied the test of “cause to the contrary” as can be seen at paras. 31, 41 and 46 of His Lordship’s grounds of judgment. From his grounds of judgment, we agree with the appellant that the learned JC had erred in law and misdirected himself by adopting and applying the test under s. 256 of the NLC which is not applicable in Sarawak. This is a material error of law which is tantamount to a misdirection in law. On this ground alone, His Lordship’s decision is plainly wrong and must be set aside.
- B
- C

The Second Point

- [26] The appellant from the start has claimed that the charge is not valid because it was procured by means of fraud, misrepresentation and total failure of consideration. To prove their claims, the appellant relied on the affidavit in opposition affirmed by its director, one Haji Zainurin bin Haji Ahmad (Haji Zainurin). There are four affidavits in opposition filed. In paras. 9, 10, 11, 12, 15, 16, 17, 18 of the first affidavit affirmed on 27 December 2018 (pp. 68-78 Record of Appeal Vol. 2A), Haji Zainurin states as follows:
- D
- E

9. I was informed by Datuk Zainal bin Haji Ahmad and I verily believe that sometime around the last two weeks of November 2016 he had several discussions with Datuk Maimoonah Mohamed Hussain, the Group Managing Director of the plaintiff (respondent) and Ms. Karmjit Kaur a/p Sarbar Singh, Head of Structured Lending of the plaintiff about the borrower obtaining an additional facility of RM30 million from the plaintiff to expedite the completion of the said project, and in return, the defendant (the appellant) as the borrower’s subsidiary would provide the said property as security for the said additional facility.
- F

10. I was informed by Haji Jamil bin Jamaludin and I verily believe that on or about 6.12.2016, he and Haji Abang Azahari bin Osman of the borrower had a meeting with Ms Karmjit Kaur a/p Sarban Singh and Mr Shahrul Izzan bin Abdul Karim of the plaintiff wherein they, on behalf of the borrower, again applied for an additional facility of RM30 million from the plaintiff to expedite the completion of the said project with its catch up plan. During the said meeting, they made a presentation of the borrower’s catch up plan to the plaintiff. In return for this additional facility of RM30 million, the borrower again offered the said property, belonging to the defendant (appellant) herein, as a security for the said additional facility of RM30 million.
- G
- H

11. However, the Supplemental Syndicated Agreement, the third party charge over the said property and the Second Supplemental Security Sharing Agreement which were prepared for execution by the borrower
- I

and the defendant failed to mention the additional facility of RM30 million applied for by the borrower at all. Upon realising this, the borrower by letter dated 15.12.2016, requested the plaintiff to review the said Supplementary Syndicated Agreement and third party charge and provide the additional facility of RM30 million on the basis of the security of the third party charge.

A

The borrower's letter dated 15.12.16 was produced as exhibit "A" and it reads as follows:

B

ZECON BERHAD

15th December 2016

Affin Investment Bank Berhad

27th Floor, Menara Boustead, 69, Jalan Raja Chulan,
50200 Kuala Lumpur.

C

Attention: Ms Karmjit Kaur

Dear Sir,

SYNDICATED FACILITIES OF UP TO RM165 MILLION

D

Hospital Petra Jaya Project (HPJ)

We refer to the draft Supplemental SFA and the other attendant documents comprising the exercise.

At the meeting held at Menara Affin dated 6 December 2016, we had requested that in consideration of our providing additional security, a sum of up to RM30 million would be provided to cater for the catch up plan for the HPJ Project.

E

However, we find that this aspect was not catered for in the documentation of the Supplemental SFA nor the third party Charge to be provided by Zecon Capital Ventures Sdn Bhd. We must point out that the land to be provided as additional security is worth more than RM100 million.

F

Hence, we appeal to you to re-look into the matter and kindly consider providing an additional facility of up to RM30 million as additional facility in exchange for the additional security.

G

Sign

Haji Zainurin

12. In order to induce the borrower and the defendant to sign the said Supplementary Syndicated Agreement, the Second Supplemental Security Sharing Agreement and the third party charge respectively, the plaintiff by letter dated 20.12.2016 informed the borrower that they would only "evaluate" the additional facility of RM30 million after the said Supplementary Syndicated Agreement, the Second Supplemental Security Sharing Agreement and the third party charge over the property have been perfected to the satisfaction of the plaintiff.

H

I

- A The plaintiff's letter of 20.12.16 was produced as exhibit "B" and it reads:
20 December 2016
ZECON BERHAD
8th Floor, Menara Zecon
No. 92, Lot 393
- B Section 5, KLTD, Jalan Satok
93400 Kuching, Sarawak
Attn: Datuk Haji Zainal Abidin Hj Ahmad/Haji Zainudin/En Jamil
Dear Sir,
- C Borrower: Zecon Berhad
Syndicated Facility: Syndicated Facilities of up to RM165 million
Project: Hospital Petra Jaya (HPJ)
Additional Security : Lot No.14, Block 16 of Salak Land District
- D We refer to your letter dated 15 December 2016.
Please be informed that your request for additional facility of up to RM30 million to cover the shortfall in funding requirement for the construction of HPJ project will only be evaluated by the Syndicate Lenders after the charge over the Salak Land as additional security for the Syndicated Facility have been duly perfected to the satisfaction of the Syndicated Lenders.
- E We wish to seek your kind cooperation to expedite on the execution of the relevant documents and perfection of the charge over the Salak Land latest by 21 December 2016.
- F Sign sign
Karmjit Kaur Shahrul Izzan
15. The plaintiff by its officers and/or agents, Ms Karmjit Kaur and Shahrul Izzan further represented and warranted that if the borrower and the defendant did not execute the said documents, the plaintiff would not grant to the borrower the additional facility of RM30 million.
- G 16. The borrower and the defendant were thereby induced by the undue influence and/or misrepresentation of Ms Karmjit Kaur and Mr Shahrul Izzan to execute the said documents.
- H 17. The said representation was made fraudulently in that Ms Karmjit and Mr Shahrul Izzan knew it to be false.
18. Neither the plaintiff nor the other Syndicated Lenders granted the borrower the additional facility of RM30 million even after the execution and perfection of the said documents.
- I

[27] In the respondent's affidavit in reply affirmed by Ms Karmjit Kaur a/p Sarbar Singh, the respondent denied the appellant's contention of fraud, misrepresentation and total failure of consideration. Instead, she averred:

- (i) paragraphs 9 and 10 of Haji Zainurin's affidavit dated 27 December 2018 is hearsay evidence and are inadmissible in evidence;
- (ii) the charge was executed voluntarily;
- (iii) the respondent never agreed to grant an additional facility of RM30 million to the borrower; and
- (iv) the request for additional security is not only in accord with the terms of the charge documents but also because the respondent fear the borrower could not repay the syndicated facilities as the borrower has failed to complete the project.

[28] On the basis of the preceding words "I was informed ..." appearing in paras. 9 and 10 of Haji Zainurin's affidavit dated 27 December 2018, the learned JC agreed with the respondent and ruled that paras. 9 and 10 of Haji Zainurin's affidavit is hearsay and is inadmissible in evidence. No reason was given for the ruling.

[29] Learned counsel for the appellant argued His Lordship's ruling is wrong in law because the occurrence of the meeting and discussion between the appellant's agents and the respondent's officers on 6 December 2016 regarding the appellant's request for additional facility of RM30 million was put down in writing in the letter of 15 December 2016 and admitted by the respondent in their letter of 20 December 2016.

[30] We agree with the appellant. In our view, the averments in paras. 9 and 10 are not hearsay simply because of the preceding words "I was informed". Contrary to the respondent's contention, these words show that the deponent had received direct information or feedback from his colleague about the meeting and discussion between the appellant's agents and the respondent's officers that had taken place at the respondent's place on 6 December 2016 and such occurrence was proven to be true. Thus, we find the learned JC had taken a simplistic approach on this issue without even considering its importance to the appellant's case that the charge was created as security for the additional facility of RM30 million requested. The evidence in paras. 9 and 10 form the foundation of the appellant's case.

[31] In this case, the appellant is challenging the validity of the charge on the ground it was procured by means of misrepresentation, undue influence and total failure of consideration. The appellant claims the charge is not valid. This is a claim *in rem*. The appellant contended the misrepresentation is in written form. They say the first misrepresentation is that the charge document did not mention the additional facility of RM30 million they had requested. The second misrepresentation is despite stating they will evaluate

- A the appellant's application *via* their letter of 20 December 2016, the respondent did not evaluate or process the appellant's application for the additional facility of RM30 million even after the charge documents had been perfected in favour of the respondent. In addition, the additional facility of RM30 million was not granted to the appellant. Thus, there was total
- B failure of consideration. The respondent admitted they never agreed to grant the additional facility of RM30 million. Therefore, when the respondent informed the appellant they will evaluate the appellant's application only after the appellant had perfected the charge, the respondent knew that if the statement (will evaluate) was false. Therefore, misrepresentation is
- C established. Next, the respondent knew if they (respondent) informed the appellant outright that their application is rejected, the charge could not be created. In order to get the charge registered, the respondent induced the appellant to sign the charge documents first. Therefore, inducement was proven. So, the charge was for the benefit of the respondent only.
- D [32] The charge had grave effect on the appellant. The appellant lost its opportunity to use the said land as security to get financial facility from other financial institutions. The question before this court is : was the respondent's conduct unconscionable? Our answer is yes. And the reason is this. The relationship between the respondent and the appellant is that of banker and
- E customer. As between them, there is no equal bargaining power. The appellant is a weaker party. The English Court recognised the principles of inequality in bargaining power. In *Llyods Bank Ltd v. Bundy* [1975] 1 QB 328, at p. 336, Lord Denning said:
- F There are cases in which the court will set aside a contract, or transfer of property, when the parties have not met on equal terms when one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.
- Further down, at p. 339, His Lordship said:
- G The English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of
- H the other ...
- [33] In *Reardon Smith Line v. Hansen Tangen* [1976] 1 WLR 989, at p. 995 Lord Wilberforce said:
- I No contracts are made in a vacuum: there is always a setting in which they have to be placed ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[34] Applying the law in *Llyods Bank* and *Reardon Smith's* case to the facts of this case, we find that the evidence before the court shows it was the appellant who offered to create a charge for additional facilities of RM30 million. That is clear to us. The appellant never agreed to create a charge as additional security for the syndicated facilities of RM165 million. The respondent contended they required the charge as an additional security for the syndicated facilities. But, they failed to produce any letter to support such request. Accordingly, the appellant's version which is supported by the letter of 15 December 2016 is to be preferred. It is this. The charge came about because it was the appellant who approached the respondent, hopeful to get the additional facility of RM30 million armed with property worth more than RM100 million to offer as security because they are in dire need of money to complete the project. By their conduct of concealing their true intention of not granting the RM30 million but wanting the charge, we find the respondent had acted unconscionably towards the appellant. The transaction was unfair and unjust to the appellant. A charge obtained by means of misrepresentation, undue influence and total failure of consideration is not a valid charge. Based on the evidence before the court, we find that it does not seem just in the circumstances to grant an order for sale.

[35] For the aforesaid reasons, we allowed the appeal and set aside the order of the High Court with costs of RM10,000 here and below to the appellant subject to allocator.

A

B

C

D

E

F

G

H

I